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Case No. —

IN THE

Supreme Court of the United States

OCTOBER TERM 1980

CARLOS SARMIENTO, ERNESTO DOMINGUEZ, and ANGEL LUIS ESTEVEZ, *Petitioners,*

versus

UNITED STATES OF AMERICA, *Respondent.*

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

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QUESTION PRESENTED FOR REVIEW

Whether the due process principles announced in *Brady* v. *Maryland* are violated when the government refuses to disclose to the defense that its own key witness was involved in unauthorized criminal activity while employed by the government as an undercover operative, even though the government had proof that the criminal actions did in fact occur.

LIST OF INTERESTED PERSONS

The only persons having an interest in this case are the Petitioners, their families, and the United States.

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Case No. —

IN THE

Supreme Court of the United States

OCTOBER TERM 1980

CARLOS SARMIENTO, ERNESTO DOMINGUEZ, and ANGEL LUIS ESTEVEZ, *Petitioners,*

versus

UNITED STATES OF AMERICA, *Respondent.*

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

The Petitioners, CARLOS SARMIENTO, ERNESTO DOMINGUEZ, and ANGEL LUIS ESTEVEZ, respectfully pray that a writ of certiorari issue to review the judgment, opinion, and order on rehearing of the United States Court of Appeals for the Fourth Circuit entered in this proceeding on November 12, 1980, and February 2, 1981.

OPINIONS BELOW

The unpublished opinion of the Court of Appeals appears in the Appendix attached hereto. The Court of Appeals denied the petition for rehearing in a per curiam order dated February 2, 1981, which is also

reproduced in the Appendix. The District Court entered its Order directed to the issues raised in this case on January 4, 1980. That order also appears in the Appendix.

JURISDICTION

The judgment of the Court of Appeals for the Fourth Circuit was entered on November 12, 1980. A timely petition for rehearing was denied without opinion on February 2, 1981. This petition for certiorari is filed within the time period authorized by this Court. Jurisdiction is invoked under 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

U.S. Constitution, Amendment V:

> No personal shall . . . be deprived of life, liberty, or property, without due process of law . . .

U.S. Constitution, Amendment VI:

> In all criminal prosecutions, the accused shall enjoy the right to a speedy and pubic trial, . . . to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the assistance of counsel for his defense.

STATEMENT OF THE CASE

Petitioners, CARLOS SARMIENTO, ERNESTO DOMINGUEZ, and ANGEL LUIS ESTEVEZ were convicted by a jury of conspiracy to import marijuana into the United States in violation of 21 U.S.C. §§ 952(a), 960(a)(1), 963, 841(a)(1) and 846. Petitioners appealed their

convictions to the Fourth Circuit Court of Appeals, raising five issues as grounds for reversal of the convictions, to wit: 1) restrictive cross-examination; 2) improper admission of hearsay testimony; 3) insufficiency of the evidence; 4) illegal search and seizure of a foreign flag ship; and 5) the denial of a motion to dismiss the indictment. The Fourth Circuit affirmed all convictions. *United States* v. *Dominguez,* 604 F.2d 304 (4th Cir. 1979). Certiorari review was sought in this Court on the question of whether the limitation of cross-examination of the government's main witness denied Petitioners' their rights under the Sixth Amendment. This Court denied certiorari on January 7, 1980. *Sarmiento* v. *United States,* —— U.S. ——, 100 S.Ct. 664 (1980).

In May 1979, during the pendency of the direct appeal to the Fourth Circuit, Petitioners filed motions for new trial based upon newly discovered evidence in that the prosecution failed to disclose favorable evidence as required by *Brady* v. *Maryland,* 373 U.S. 83 (1963). In an order entered January 4, 1980, the District Court summarily denied the motions without holding an evidentiary hearing (App. 1-5). That ruling was then appealed to the Fourth Circuit, which affirmed the District Court without issuing a published opinion (App. 16-17). *United States* v. *Sarmiento,* 639 F.2d 783 (4th Cir. 1980).

The trial of the instant case involved serious questions of due process and fundamental fairness which permeated the events leading up to the convictions of the Petitioners. The core of the government's case was based on the testimony of its first and star witness, Wade Bailey. Bailey was intimately involved in the

conspiracy and described it in detail. He was the captain of the fishing trawler OSPREY, but was also a cooperating informant with the Drug Enforcement Administration (T. 334-335). Without Bailey's testimony, convictions of the Petitioners would not have been possible.

During the pre-trial proceedings, Petitioners requested to be furnished with all favorable evidence, including any evidence that could be used for impeaching the credibility of witnesses (AR. 1, p. 35). The government did not supply any information relating to the credibility of the witnesses (R. 1, Exhibit B; AR 74-75).

During trial, Bailey testified as to events and acts that related to the Petitioners' involvement in the conspiracy (T. 334-335, 369-371). The Petitioners, however, challenged Bailey's testimony and presented alibi witnesses who placed them at another location during the supposed conspiratorial meetings (T. 1383-1390).

Subsequent to Petitioners' trial, an individual known as Richard Grant was tried for his involvement in smuggling eleven tons of marijuana on the Cape Fear River. During that trial, which also involved the key testimony of Wade Bailey, it was revealed that Bailey, while working as a government undercover operative, offloaded six hundred pounds of marijuana from the OSPREY onto a small aluminum boat. This skimming was an unapproved venture designed for Bailey's personal gain.

At the time of the trial of this case, the government had strong reason to suspect that Bailey had committed this independent crime. Although Bailey

had explained this "skimming" to the government, he had denied that it was for his benefit. However, the government was aware of substantial information to the contrary, including evidence from a member of Bailey's crew who advised the government that Bailey had skimmed the marijuama for his own profit.

Despite due diligence on the part of the defense in the preparation of the case for trial, there was no way that the defense could have become aware of Bailey's misdeeds. The government had previously refused to reveal the whereabouts of Wade Bailey and specifically cautioned defense counsel that any attempted contact with Wade Bailey would be considered an obstruction of justice (AR 1, p. 74, R 1, Exhibit B). It was only when defense counsel received the testimony from the Richard Grant trial that Petitioners had actual evidence of the fact that Bailey had skimmed up to six hundred pounds of marijuana for his own personal benefit without the consent or permission of the United States.

The government's actions during the trial in question demonstrated, in retrospect, their awareness of Bailey's misdeeds. Every attempt by defense counsel to generally cross-examine Bailey on any unauthorized activities that may have taken place was met with a vehement government objection (T. 445-446, 454-455, 458-469, 460).

Subsequent to the instant trial, Petitioners moved for a new trial, alleging the above-related facts and attaching documentary support for the allegations (R 1). The government did not respond to the motions, nor did the District Court conduct an evidentiary hearing on the matters raised herein. The motions were

summarily denied by the District Court and affirmed by the Fourth Circuit.

REASONS FOR GRANTING THE WRIT

The Due Process Principles Of *Brady* v. *Maryland* And Its Progeny Are Seriously Violated When The Government Refuses To Disclose To The Defense That Its Own Key Witness Was Involved In Unauthorized Criminal Activity While Employed By The Government, Which Activity Was Highly Relevant To The Offense For Which Petitioners Were Tried.

Among the most revered tenets of our criminal justice system is that the prosecution is not permitted to suppress evidence favorable to an accused where the evidence is material for either guilt or punishment. *Brady* v. *Maryland,* 373 U.S. 83 (1963). This rule is not one of discovery, but is a rule of fairness and minimum prosecutorial obligation. *United States* v. *Agurs,* 427 U.S. 97, 107 (1976); *Goldberg* v. *United States,* 425 U.S. 94 (1976).

With respect to the conduct of criminal trials, *Brady* holds that "the suppression by the prosecution of evidence favorable to an accused upon request violates due process where the evidence is material to either guilt or punishment, *irrespective of either the good faith or bad faith of the prosecution.*" 373 U.S. at 87 (emphasis added). *See also Giglio* v. *United States,* 450 U.S. 150, 154 (1972). Resolution of a *Brady* claim focuses, not on the subjective intention of government officials in withholding information, but on the materiality and favorable character of that which is actually suppressed. *Moore* v. *Illinois,* 408 U.S. 786, 794-795 (1972).

This Court and the federal appeals courts have consistently recognized that the government has an absolute obligation to produce impeachment evidence favorable to an accused, as well as direct evidence. *Chavis* v. *North Carolina,* 637 F.2d 213 (4th Cir. 1980); *United States* v. *Anderson,* 574 F.2d 1347 (5th Cir. 1978); *Williams* v. *Dutton,* 400 F.2d 797 (5th Cir.), *cert. denied,* 393 U.S. 1105 (1969); *United States* v. *Atkinson,* 429 F.Supp. 880 (E.D.N.C. 1977). As this Court recognized in *Giglio* v. *United States,* 405 U.S. 150, 154 (1972), quoting *Napue* v. *Illinois,* 360 U.S. 264, 269 (1959):

> When the "reliability of a given witness may well be determinative of guilt or innocence," nondisclosure of evidence affecting credibility falls within the general rule of *Brady.*

This Court has on several occasions analyzed the *Brady* rule in an effort to define a line of demarcation for determining when due process violation occurs. In *Moore* v. *Illinois,* 408 U.S. 786 (1972), this Court recognized that the presence of three criteria results in a *Brady* violation: a) suppression of evidence by the prosecution after a defense request; b) the favorable character of the evidence for the defense; and c) the materiality of the evidence. 408 U.S. 794-795. When the defense makes a specific request for disclosure of particular evidence, as occurred in this case, and no disclosure is forthcoming from the government, a new trial is required whenever the suppressed evidence might have affected the outcome of the trial. *United States* v. *Agurs,* 427 U.S. 97, 104-105 (1976).

The present case presents a situation wherein a very serious due process question was raised, and

improperly rejected by the courts. The primary reason, however, why this case warrants review by this Court is that it presents the question of who is to make the determination of whether *Brady* material is possessed by the government. If the present case is upheld, it is clear that the prosecution controls resolution of the due process claim. For, both the District Court and the Fourth Circuit, by implication, allowed the prosecution to be the sole arbiter of whether the Wade Bailey "skimming" crime was material, favorable, and subject to production. The matter was never presented by the government to the presiding judge to determine whether fundamental fairness required that Bailey's misdeeds be produced. Instead, the govment accepted the role of investigator, judge, and jury with regard to the suppressed evidence and performed these functions without even the slightest concern for the rights of Petitioners. The government decided to itself determine the credibility of the information received regarding Bailey's criminal activities and resolved that issue in favor of Bailey's version, which ultimately was proved to be false.

When the suppression of this essential evidence was discovered, it was immediately brought to the attention of the District Court by a motion for new trial. Without even conducting an evidentiary hearing, the District Court determined that the suppressed evidence did not rise to the level of *Brady* material because it was unconfirmed at the time of trial. The Fourth Circuit approved that finding.

It is submitted that this approval by the courts of the procedure utilized in this case is in direct conflict

with this Court's decision in *United States* v. *Agurs, supra* at 106:

> Although there is, of course, no duty to provide defense counsel with unlimited discovery of everything known by the prosecutor, if the subject matter of such a request is material, or indeed if a substantial basis for claiming materiality exists, it is reasonable to require the prosecutor to respond either by furnishing the information *or by submitting the problem to the trial judge.* When the prosecutor receives a specific and relevant request, *the failure to make any response is seldom, if ever, excusable.* (Emphasis added).

This procedure is without question required in every situation when a government attorney, law enforcement officer, investigative agency, or employee possesses material and favorable information. *United States* v. *Beasley,* 576 F.2d 626 (5th Cir.), *reh. denied,* 585 F.2d 796 (1978), *cert. denied,* 440 U.S. 947 (1979). It matters not that the prosecutor did not have evidence to prove "beyond a reasonable doubt" that Bailey had committed criminal acts while functioning as a government agent and then lied to cover up his complicity; what does matter, in a constitutional sense, is that favorable material was possessed by the main government witness, and was not disclosed to the defense. The information possessed by Bailey is obviously imputed to the prosecution. *Id.* at 630-631. Consequently, the *Brady* claim involved herein cannot be discarded merely because, as the lower courts held, the prosecutor was not certain who was telling the truth. The Constitution requires, and fundamental fairness suggests, that in a case of doubt, the material be disclosed or at least presented to a judge for an impartial resolution.

This was the very approach taken by a district court in *United States* v. *Countryside Farms, Inc.*, 428 F. Supp. 1150, 1154 (D. Utah 1977), when it charted the course to be taken by a prosecutor in dealing with *Brady* information:

> [T]he only course to be followed by a prudent prosecutor is to *supply any evidence which is even arguably favorable to a defendant on the question of guilt or on the question of punishment.* That it may be burdensome to supply such evidence is no excuse, and it is unimportant if the government fails in good faith to supply exculpatory evidence. The duty to disclose exculpatory evidence is absolute, and the government must furnish to defendants all evidence known to government counsel or known to any government agent participating in the preparation or prosecution of the case which "is favorable to an accused (and is) material either to guilt or punishment." *In deciding what evidence should be supplied, the prosecution must resolve all doubts in defendants' favor.*

See also Barbee v. *Warden,* 331 F.2d 842 (4th Cir. 1964).

The Fourth Circuit's ruling upholding the denial of the new trial motions conflicts, not only with *Brady, Agurs,* and *Moore* v. *Illinois,* but also with ample federal appellate decisions, as cited above. Most recently, the Fourth Circuit had occasion to consider an issue very similar to that presented by Petitioners; there, the Court adopted the approach which has been suggested throughout these proceedings. The decision was *Chavis* v. *North Carolina,* 637 F.2d 213, 223 (4th Cir. 1980), which held:

> . . . Hall was a crucial witness for the state, and his credibility was the most basic issue in the case.

> The production of his amended statement was requested once in general terms and six times in specific terms. Had the jury learned that Hall's effort to rehabilitate his credibility when confronted with the numerous significant inconsistencies between his testimony and his February 18 statement was an untruth. Hall may well have been disbelieved in the entirety of his testimony and petitioners or some of them found not guilty. In short, we have no doubt that the materiality test of *Agurs* was met. Indeed, the conclusion is inescapable that Hall perjured himself in his repeated, unfounded testimony that his February 18 statement had been amended to make it conform to his testimony at trial, and this fact was bound to be known to the prosecutor who possessed the corrected statement so that the "any reasonable likelihood test" for the knowing use of perjured testimony would be applicable even if production of the amended statement had not been specifically requested. (footnote omitted.)

The right to have information which is material and favorable to the defense is well-settled. Similarly, there is no longer any dispute regarding the fact that the prosecution is burdened with the obligation of disclosing all such information in the possession of government personnel. It is not sufficient for the prosecution to itself determine the credibility, weight, and character of potentially favorable evidence. That is the function of the judiciary. The failure to disclose the information at issue herein calls into serious question the criminal guilt of these Petitioners. This Court should grant certiorari to reaffirm its mandate that those accused of criminal activity will not be convicted due to the unfair and prejudicial withholding of evidence by the government. The Constitution requires that when suppression of evidence calls into dispute

the culpability of one found guilty of a crime, a new trial be ordered which is free from the specter of injustice. A review of the Fourth Circuit's decision is justified.

CONCLUSION

For the reasons stated above, a writ of certiorari should issue to review the judgment and opinion of the United States Court of Appeals for the Fourth Circuit.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 13th day of April, 1981, three copies of the Petition for Writ of Certiorari were delivered by hand to the Solicitor General, Department of Justice, Washington, D.C. 20530, and by mail to the United States Attorney, P.O. Box 26897, Raleigh, North Carolina 27611. I further certify that all parties required to be served have been served.

By /s/ EDWARD R. SHOHAT
Edward R. Shohat

By /s/ BENEDICT P. KUEHNE
Benedict P. Kuehne

APPENDIX

APPENDIX

IN THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF NORTH CAROLINA
WILMINGTON DIVISION

No. 77-39-CR-7

UNITED STATES OF AMERICA, *Plaintiff*

vs.

ERNESTO DOMINGUEZ, ANGEL LUIS ESTEVEZ, CARLOS SARMIENTO and NOLLIE ALEXANDER, *Defendants*

ORDER

[Filed January 4, 1980]

Following a trial which commenced in this court on February 20, 1978, the named defendants and others were convicted of conspiring to smuggle into this country six tons of marijuana in violation of Title 21, United States Code, Sections 952(a), *et seq.* The named defendants appealed their convictions and the judgments entered thereon to the Court of Appeals for the Fourth Circuit which affirmed the convictions in a decision rendered August 10, 1979. In May, 1979, during the pendency of their appeals the defendants Dominguez, Estevez and Sarmiento filed in this court two motions for new trial based on newly discovered evidence and the alleged violation by the prosecution of the Jencks Act, 18 U.S.C. § 3500. In an order filed August 10, 1979 coincident with the decision affirming defendants' convictions the Fourth Circuit denied their motions to stay the appeal without prejudice to their right to present to this court their new trial motions which had already been filed here in May, 1979.

In September, 1979 Dominguez, Estevez and Sarmiento filed in this court a motion for stay of surrender pending

determination by this court of their post-trial motions. A similar motion for stay of surrender was filed at the same time by counsel for the defendant Nollie Alexander "pending determination by the court of his post-trial motions." The record does not reveal that Alexander has filed any such motions, but the court is now informed by counsel for Alexander that he had understood that counsel for the other defendants would include Alexander as a movant in their motions and that in any event it was his intention to adopt the motions of the co-defendants on behalf of Alexander. The court will allow this adoption *nunc pro tunc.*

Before deciding these motions the court has been awaiting a response to them by the government, but to date none has been forthcoming. Since the court has recently had under consideration motions filed by other convicted defendants in another drug smuggling case based on facts substantially identical to those involved in the motions presently under consideration the court feels that it is familiar with the government's position with respect to these motions and will proceed to decision without awaiting a response by the government.

Central to the new trial motions of the defendants is the contention that prior to the trial of the case the government possessed information which would have shown that its principal witness, one Wade Bailey, while working for the government in an undercover capacity in another marijuana smuggling case near the time here involved had "skimmed", that is, stolen and converted to his own use, approximately 500 pounds of marijuana from the load he was bringing into the country in that case; that failure to disclose this information to defense counsel precluded effective cross-examination and impeachment of Bailey's credibility at the trial in this case; and that such failure constituted violations by the government of the rights of the defendants under *Brady v. Maryland,* 373 U.S. 83 (1963), and the Jencks Act, 18 U.S.C. § 3500. For the reasons to follow the motions will be denied.

In a hearing held on March 9, 1979 in Case No. 78-2-CR-7, United States v. Mark Phillips (presently pending in the Fourth Circuit on the appeal of Phillips from his conviction under No. 78-5147), which arose out of the marijuana smuggling conspiracy during the course of which Wade Bailey stole for his own use 500 pounds of the shipment of marijuana evidence of which it is contended the government suppressed at the trial of the present defendants on a separate drug smuggling conspiracy charge, the defendant Mark Phillips was represented by Edward R. Shohat of the Miami, Florida bar who now appears as counsel for these defendants in connection with the motions presently under consideration. At the trial the defendants other than Alexander were represented by John R. Newton of the Wilmington, North Carolina bar, and Alexander was represented by Robert White Johnson of that bar. At the March 9 hearing Assistant United States Attorney Herman Gaskins who has prosecuted each of the two conspiracy cases was called as a witness and cross-examined extensively by Attorney Shohat. As a result of the evidence adduced at this hearing the court thereafter made detailed findings in an order filed May 17, 1979, a copy of which will be attached to this order marked Exhibit A and by this reference incorporated herein.

In substance that evidence tended to show that at the February, 1978 trial of these defendants the government did in fact have information indicating that its witness and undercover agent, Wade Bailey, had in fact offloaded a quantity of marijuana from the "Don Elias" shipment prior to reaching the pre-arranged landing site, but at the time of the trial Bailey was still denying that he had been guilty of any wrongdoing in this connection. Efforts to check out a statement by one of Bailey's helpers, Charles Maultsby, which had tended to implicate Bailey, had proven unsuccessful at the time of this trial, and since in connection with his then pending plea of entrapment a serious

conflict of interest had arisen between Maultsby and Bailey, Maultsby's statement was discredited by the government at that time. Thus Bailey's involvement in illegal activity on his own account in connection with the DON ELIAS case remained in the rumor stage, and as is indicated in the affidavit of Attorney Newton (Exhibit D) attached to the motions in this case, all counsel appearing in the case were well aware of these rumors. Efforts of these defendants to check out the rumors through the use of a private detective and other means had proven just as unsuccessful as had the efforts of the government in this regard.

On the basis of the facts found in the Phillips order the court concluded that there had been no violation by the government of the *Brady* rule, and the Phillips' motions were denied.[1]

Finally, for all practical purposes both the *Brady* and Jencks Act contentions of these defendants would appear to be foreclosed by the ruling of the Fourth Circuit in this court's refusal to allow Bailey to be cross-examined concerning Bailey's "skimming" activities in the DON ELIAS case. On appeal these defendants assigned as error this court's refusal to allow Bailey's impeachment on this question, arguing that Bailey had subjected himself to the possibility of prosecution and that examination on this subject

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[1] Prior to the trial of Mark Phillips the government came into possession of some additional evidence of Bailey's wrongdoing which it failed to make known to defense counsel, and following the Phillips trial Bailey confessed the theft and conversion to his own use of the 500 pounds of marijuana to the government but was granted immunity by the United States from prosecution for this offense. This and other "newly discovered" evidence became the subject of further motions for new trial lodged by Phillips during the pendency of the appeal from his conviction, but these motions have recently been dismissed by this court following disclosure that Phillips is presently a fugitive from justice.

was proper impeachment to show bias or self interest. In disposing of this contention the Fourth Circuit said:

> "A review of the record indicates that the district court allowed extensive impeachment of Bailey's credibility. The court permitted questions which elicited that Bailey's primary motive for assisting the government was the expectation of a monetary reward; that he had taken $43,000 from the defendants and had not turned it over to the government; that he might have been willing to smuggle marijuana himself had he not been working for the government; that he had a prior conviction; and that he did not support his children. Moreover, the district court did not limit cross-examination of Bailey concerning his actions and motives with respect to the smuggling conspiracy for which the appellants were being tried.
>
> "In view of the comprehensive impeachment evidence that was introduced and the thorough examination of Bailey concerning his transactions with the *Sea Crust* conspirators, exclusion of testimony about Bailey's illegal double-dealing in other smuggling was within the bounds of the court's permissible discretion.
>
> "Closely related to this assignment of error is the appellant's motion to supplement the record and to dismiss the prosecution. The motion to dismiss alleges that an Assistant United States Attorney knew that Bailey committed perjury when he denied skimming marijuana while working as an undercover agent in the other smuggling incident. Bailey's denial was not made known to the jury because the court had excluded this line of testimony.
>
> "We grant the motion to supplement the record. The record as supplemented, however, does not sustain the charge that the prosecution knowingly acquiesced in the introduction of perjured testimony. Accordingly,

the motion to dismiss is denied." *United States v. Dominguez,* 604 F.2d 304, 310-11 (4th Cir. 1979).

As stated in the Phillips order, the court remains of opinion that there is no reasonable likelihood that the evidence of which these defendants now claim to have been deprived would have had the slightest effect on the verdict of the jury. *Shuler v. Wainwright,* 491 F.2d 1213 (5th Cir. 1974).[2]

All pending motions of the defendants named in the caption of this order are denied, and inasmuch as the mandate of the Fourth Circuit affirming the judgments in these cases has now been received and filed in this court, the defendants are ordered to report immediately to begin the service of their sentenecs.

/s/ F. T. DUPREE, JR.
F. T. Dupree, Jr.
United States District Judge

January 4, 1980.

---

[2] Other aspects of the Wade Bailey matter have been dealt with extensively in a memorandum cf decision filed January 4, 1980 in two other cases arising out of the DON ELIAS smuggling conspiracy, No. 78-20-CR-3, United States v. Richard Elliott Grant, Jr. (appeal pending in the Fourth Circuit as No .78-5159), and No. 78-15-CR-7, United States v. Robert Meinster and Robert Platshorn (appeal pending in the Fourth Circuit as No. 79-5025 and No. 79-5026).

IN THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF NORTH CAROLINA
WILMINGTON DIVISION

No. 78-2-02-CR-7

UNITED STATES OF AMERICA, *Plaintiff*

vs.

MARK PHILLIPS, *Defendant*

ORDER

[Filed May 17, 1979]

Mark Phillips was convicted in this court on April 13, 1978 of conspiracy to import marijuana in violation of the pertinent sections of Title 21, United States Code. On motion of defendant's counsel sentencing was delayed until May 8, 1978. A further motion by defendant to postpone sentencing was allowed, and the defendant was sentenced on May 12, 1978. Meanwhile, defendant had filed a motion for a new trial based on a letter written to the court following verdict by one of the jurors indicating that the verdict had been the result of a compromise and numerous other grounds. The motion was overruled by order filed May 12, 1978.

Defendant then appealed his case to the Fourth Circuit Court of Appeals where he filed a motion to remand to this court for the purpose of lodging further motions. On November 21, 1978 the Fourth Circuit denied the motion for remand but directed this court to consider motions to dismiss and for a new trial which had been filed in this court on October 23, 1978 and to conduct such evidentiary hearings as deemed necessary in this connection.

Because of the press of other business the court was not able to schedule the evidentiary hearing until March 9,

1979, and continuous courts together with a deluge of other work with which the court has been faced has resulted in further delay in reaching decision on defendant's motions.

The two motions now before the court involve essentially the same facts and these in turn revolve around defendant's contention that one Wade Bailey, a government informant who testified at defendant's trial, had been guilty of appropriating to his own use a considerable quantity of the marijuana involved in the smuggling operation in connection with which defendant stands convicted. It is contended that the government was aware of Bailey's wrongdoing at the time of defendant's trial, knowingly withheld the information from defendant's counsel, and allowed Bailey to testify falsely concerning the matter and argued Bailey's innocence to the jury, all in violation of the rule in *Brady v. Maryland*, 373 U.S. 83 (1963), and other cases such as *Napue v. Illinois*, 360 U.S. 264 (1959) and *Giglio v. United States*, 405 U.S. 150 (1972). On the basis of the evidence adduced at the hearing the court finds defendant's allegations are unsupported and instead the facts are found as set forth below.

This case was prosecuted on behalf of the government by Assistant United States Attorney Herman Gaskins. Gaskins had been assigned another marijuana smuggling case involving the vessel "Sea Crust" in the fall of 1977, and he went from his headquarters in Raleigh to Wilmington on Thanksgiving weekend of that year to investigate that case. He knew that there was a government informant in that case, but at that time he was not aware that the informant was Wade Bailey. Gaskins did meet Bailey in the month of December, 1977, and by that time Bailey's undercover activity had resulted in the seizure of the large shipment of marijuana which Bailey had unloaded and brought ashore from the vessel, "Don Elias", it being the shipment involved in the present case.

While Bailey was en route from the open sea where he had taken on the load of marijuana from the "Don Elias" and was proceeding up the Cape Fear River to the proposed landing site on the night of December 7-8, 1977, a small boat came alongside Bailey's fishing trawler on which the marijuana was being transported, and at Bailey's direction about five hundred pounds of marijuana was loaded on the smaller craft which then disappeared. Bailey told Gaskins about this incident but falsely stated that he did not know the identity of the operator of the small boat but had assumed that it was one of the conspirators whom he was in process of helping to be apprehended and that this individual was engaged in an activity known in this nefarious business as "skimming," a device by which a conspirator obtains and sells for his own use a quantity of the contraband without sharing his profits with his co-conspirators.

Notwithstanding Bailey's explanation which seemed plausible enough to Gaskins, rumors began to crop up in the Wilmington area that the person in the small boat which had off loaded the marijuana before Bailey's boat reached the agreed landing site was really an accomplice of Bailey and that these two were in fact engaged in a skimming operation of their own.

At the trial in February of 1978 of the conspirators indicted in the "Sea Crust" case defense counsel sought to interrogate Bailey concerning his alleged skimming activities in the "Don Elias" case, but the government's objection was sustained on relevancy grounds. In a whispered answer to the court reporter for the record Bailey denied that he had off loaded any marijuana in the Cape Fear River.

Within a month thereafter when Mr. Gaskins was preparing for trial the cases arising out of the "Don Elias" seizure, Bailey stated in the course of his interview by Gaskins that Gaskins must have been surprised by his

denial of the off loading incident but explained that he had answered the question in the negative because the incident had taken place in a tributary of the Cape Fear River instead of the river itself as the question had specified. To this Gaskins replied that he wasn't surprised because he had not been privy to Bailey's whispered answer to the court reporter and in fact was not aware that counsel were permitted to hear such answers.

The notes Gaskins took of his interview with Bailey in December of 1977 or January of 1978 show that Bailey told him that on the night in question a single man wearing a ski mask came alongside his boat in a "duck boat" and took on the marijuana; that he had not known the boat was coming; that he thought this was a common practice in "marijuana deals" and that he assumed that this person was George Purvis or Lee Smith, two of the conspirators who lived in North Carolina, who were "skimming" from the Florida conspirators, Platshorn, Meinster and Grant. Bailey denied that he knew where this five-hundred-pound lot of marijuana went to after it was taken off his boat.

George Purvis and Lee Smith entered guilty pleas to the charges brought against them in connection with the "Don Elias" case. Gaskins is not sure whether he ever asked Smith about this skimming operation prior to the trial of Mark Phillips, the defendant in this case, but he is sure that he never asked Purvis about it prior to the Phillips trial. This is because he only met Purvis three days before the Phillips trial began and his conversation at that time with Purvis and his attorneys was concerned solely with the attempt of Purvis to negotiate a plea bargain agreement which would incorporate some concessions, a proposal which Gaskins rejected. Even so, Purvis indicated that he would nevertheless cooperate with the government and testify against his co-conspirators, and he had been scheduled to testify against Phillips. Following the taking of his guilty plea, however, he left the state and did not

return until the morning after the government had rested its case against Phillips, and the court declined to reopen the case on the government's motion following the representation of counsel for Phillips that he had released the defendant's witnesses to return to Florida the night before in reliance on the fact that the government had rested its case.

By the time the Phillips trial occurred Gaskins was aware of the "allegations, gossip and rumors" about Bailey's activities in connection with the alleged skimming operation, but his efforts and those of the investigating officers to pin down the rumors prior to the trial had not been successful. It was not until more than three months after the Phillips trial that Bailey made a clean breast of the affair to the United States Attorney, George Anderson, at a conference in Raleigh on July 26, 1978 at which Gaskins and Customs Officer, John Dolan, were present. This conference was not arranged by Gaskins, and in fact he did not know it was going to occur until he was invited to participate in it a few minutes beforehand. At the conference Bailey was offered immunity for his misdeed, and he proceeded to admit that he had in fact participated with a man named Gene Carnes in this endeavor. Gaskins had nothing to do with the immunity offer, and the court is under the impression that the fact is that he would personally have strongly opposed the idea.

Although Gaskins was aware that some marijuana had been off loaded by Bailey before he reached the agreed landing site on the night in question, he did not disclose this fact to defense counsel in either the "Sea Crust" or "Don Elias" cases because he was not aware prior to the trial of these cases that Bailey had done anything illegal, and in fact since Bailey had been authorized by the Customs Service to cooperate with Purvis and the other co-conspirators, Gaskins was of the opinion that no crime had been committed. Gaskins concedes that there were rumors in the

Wilmington area of wrongdoing by Bailey in this connection, and in consequence Gaskins spent a considerable time in investigating the matter. The results of his investigation prior to the Phillips trial were inconclusive, and the matter was still in the rumor stage as that case proceeded to trial.

Gaskins had been told by Charles Maultsby, a member of Bailey's crew on the night in question, that Bailey had off loaded the marijuana for his own use, and this conversation took place on January 16, 1978. However, at that time Maultsby himself was under indictment and it was Gaskins' feeling that Maultsby, who was trying to establish a defense of entrapment (which later proved to be successful), had every reason to try to incriminate Bailey. Gaskins was therefore unwilling to accept Maultsby's statements without further investigation. Gaskins and some of the investigating agents went to Florida and tried to locate Gene Carnes, who had been identified by Maultsby as Bailey's cohort in the skimming venture, but were unable to do so. After returning to North Carolina Gaskins was able to reach Carnes by telephone, and at his request Carnes came to Gaskins' office in Raleigh on April 5 for a conference with Gaskins and Agents Dolan and Christenbury. Carnes was advised of his rights and interviewed for about an hour. The upshot of the conference was that Carnes denied ever talking to Bailey about marijuana, denied being in a duck boat on the night in question and denied knowing anything about it. Carnes gave an alibi as to his whereabouts on the dates in question which Gaskins thereafter tried without success to check out.

Gaskins then confronted Bailey with Maultsby's statements and Bailey again denied them. He did not disclose this information to defense counsel because he did not consider it was his duty "to spread the community gossip and unconfirmed rumors by indicated co-conspirators who had motives to lie." Moreover, Gaskins did not deem it necessary to communicate these rumors to Phillips' local

counsel, Fred Anderson, who was quite as aware of the rumors as was Gaskins and who had continually prodded Gaskins about the matter. To Anderson's inquiries Gaskins had repeatedly replied that "you know as much about it as I do."

Attesting Gaskins' good faith in the matter is the fact that he engaged Phillips' primary counsel, Edward Shohat, in the hall while the jury was deliberating the case and for purposes of satisfying his curiosity he asked why Bailey had not been cross-examined about the skimming operation as the defense lawyers in the "Sea Crust" case had done. Shohat simply sloughed off the inquiry, and contrary to Shohat's sworn affidavit which appears in the file, he told Gaskins that his failure to cross-examine Bailey was a tactical decision which he made during the trial not to question Bailey about the subject. A similar inquiry directed by Gaskins to Attorney Fred Anderson brought the reply that he did not know why the subject had not been probed on cross-examination for that Shohat had made all the decisions during the course of the trial.

At the time the appeal of the defendants in the "Sea Crust" case was being argued in the Fourth Circuit on March 6, 1979 Attorney Shohat had become counsel for some of them, and during the course of oral argument he was asked from the bench as to why he had not cross-examined Bailey on the skimming matter in response to which Shohat told the court that he had reviewed the transcript of the "Sea Crust" trial prior to the Phillips trial and that "on that basis alone he did not ask Wade Bailey in the Mark Phillips trial about it because he thought that he would 'be blowing smoke.'" Gaskins conceded that Shohat also told the Fourth Circuit something to the effect that at the Phillips trial it would have been unethical for him to interrogate Bailey without the benefit of hard evidence of Bailey's wrongdoing as distinguished from the rumor information which he admittedly had.

On the basis of the testimony of Customs Agent John Dolan given at the hearing the court finds that neither Dolan nor anyone in the government knew about Bailey's intention to off load some of the marijuana for his own benefit, but on the morning following the seizure Bailey told him about this and had given him the story about the man in the ski mask, thought by Bailey to be "somebody who was part of the organization," coming alongside Bailey's boat and taking on the marijuana. Bailey had been cautioned in advance that these smugglers would have small boats in the river monitoring the activities of Bailey's boat, the "Osprey". Not until after Bailey had been given immunity on July 26, 1978 did he ever disclose that this was his own deal. Apparently Bailey's accomplice, Gene Carnes, has now been given immunity, but Dolan is not aware of the details of this.

Frederick Anderson, Phillips' local counsel, testified at the hearing that prior to the Phillips trial he had no evidence "outside of rumors that were circulating in Wilmington, North Carolina to the effect that Wade Bailey had skimmed off a sum of marijuana as he came up the Cape Fear River." Attorney Anderson said that he had tried to talk to Charles Maultsby's attorney prior to the Phillips trial but that the attorney had declined to tell him anything pending decision on Maultsby's motion to dismiss the charges against him. Anderson had learned through one of the attorneys representing some of the defendants in the "Sea Crust" case that a detective hired by those defendants to investigate the skimming operation was unable to turn up anything.

Frederick Anderson was also counsel for the defendant Richard Grant, an alleged co-conspirator of Mark Phillips, and at Grant's trial which occurred between May 22 and 25, 1978, Anderson learned through the testimony of a government witness named Kelly, also a crewman on Bailey's boat, that he had tossed some bales of marijuana onto the

small boat which had come alongside Bailey's boat on the night in question. Attorney Shohat was given this information and a transcript of the Grant trial as soon as it became available.

In addition to the foregoing facts which the court finds from the evidence offered at the hearing on March 9, 1979 the record in the case prompts the following additional facts and observations which the court deems relevant to the inquiry.

The witness Wade Bailey was subjected to a thorough and searching cross-examination at the trial, and when he testified that his only reason for cooperating with the government was the hope of financial reward, he established himself as one easily motivated by greed, and this served to put his credibility directly in issue. Had he been cross-examined about the skimming operation and had he chosen not to avail himself of his Fifth Amendment privilege and tell the truth, it would have added little, if anything, to the assault on his credibility. The undisputed facts would have remained that Bailey did, in fact, meet the "Don Elias" off the North Carolina coast, take on some twenty-two tons of marijuana and transport it to the landing site on the Brunswick River near Wilmington where the raid by the officers took place.

Much of the testimony given by Bailey against Mark Phillips related to the second count of the indictment charging the substantive offense of importation of marijuana, and for reasons best known to itself and somewhat to the court's surprise the jury found Phillips not guilty on this count.

Although they were in possession of as much evidence as the government had at the time of the Phillips trial in April, 1978, counsel for Phillips waited for more than six months before asserting the grounds set forth in the motions now under consideration by the court. No acceptable explanation for this delay has been advanced. Meanwhile

defendant has filed a motion for new trial assigning various other grounds immediately following the trial, and it is understood that the denial of that motion is one of the issues presently before the Fourth Circuit on appeal.

Counsel for defendant have not pointed to a single fact testified to by Bailey at the Phillips trial which can be shown to have been false.

Even without any of the testimony of Bailey, ample evidence of Phillips' guilt was provided by way of the testimony of a co-conspirator, Gaylord Lee Smith, who, according to the court's observation, gave a straightforward, thoroughly credible account of Phillips' involvement in the conspiracy, and the circumstantial evidence provided by motel registration forms, telephone records, etc.[1]

On the basis of these findings the court has no hesitance in concluding that the government did not knowingly and intentionally fail to disclose to defendant's counsel material evidence tending to show bias and affecting the credibility of the witness Bailey nor did it solicit, acquiesce in or affirmatively use materially untrue testimony of Bailey in obtaining the conviction of Mark Phillips. The court finds that there has been no violation of the rule in *Brady v. Maryland* in this case.

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[1] Although it cannot be used against Phillips in this case, the testimony of the co-conspirator, George Purvis, in related cases, which as stated before, was not available to the government in this case, has served to establish Phillips' involvement about as conclusively as the government could ever hope for short of a confession by Phillips. It was the court's feeling that the government had already made out a clear case against Phillips at the time it moved to reopen the case to allow Purvis, who arrived late for the trial, to testify, and it was for this reason, that is, that the Purvis testimony would be merely cumulative, that the court denied the motion rather than for the reason advanced by defense counsel, which the court largely discounted, that he had released his witnesses (unlisted and unsubpoenaed) to return to Florida the night before on the strength of the government's having rested its case.

Nor have the principles in the *Napue, Giglio* and related cases been transgressed. In those cases the facts revealed that without the alleged impeaching evidence the government witness was able to present a completely "clean" appearance to the jury and "the jury was left without any evidence that the witness was vulnerable." *United States v. Croucher,* 532 F.2d 1042, 1045 (5th Cir. 1976).

There appears to this court no reasonable likelihood that the evidence of which this defendant now claims to have been deprived would have affected the judgment of the jury. *Shuler v. Wainwright,* 491 F.2d 1213 (5th Cir. 1974).

The unsubstantiated rumors concerning Bailey's wrongful actions did not constitute, in this court's view, information required to be communicated to defense counsel under the *Brady* rule, but even so the information was already well known to defense counsel, and they have no one to blame but themselves for not availing themselves of the information for cross-examination purposes at the trial. Their failure so to do and their action in waiting six months to raise the point should be held to constitute a waiver of defendant's rights, if any, related to this subject.

The suggestion by defense counsel that it would have been unethical for them to cross-examine Bailey without hard evidence of his illegal activity is rejected. Counsel in the "Sea Crust" trial which preceded the Phillips trial had perceived no problem in this regard, and except for the fact that objection to their questioning was sustained on relevancy grounds, they obviously would have explored the matter in depth. It is difficult to see how defense counsel in the present case can complain that the government failed to disclose information to them which at best would have consisted only of an unsubstantiated rumor and at the same time take the position that had the information been available, it still could not have been used because of ethical considerations.

The court is left with the definite impression that the failure of Attorney Shohat to raise at trial the matters now urged upon the court was the result of a deliberate tactical decision reached in the hope of preserving a ground for reversal or a new trial in the event of a conviction which appeared highly probable at the time. No other plausible reason has been advanced for the decision, and the court can think of none. If the court's impression is correct, the ploy will not be allowed to succeed, at least in this court.

The defendant's motions to dismiss and for a new trial are denied.[2]

/s/ F. T. DUPREE, JR.
F. T. Dupree, Jr.
United States District Judge

May 17, 1979

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[2] The grounds advanced in support of these motions other than the Bailey affair have been considered by the court and found to be without merit. As stated in the court's order of May 12, 1978, defendant's argument based on the letter received by the court from the juror, Theresa Cool, following the verdict is, of course, without merit. *Dickenson v. United States*, 421 F.2d 630 (5th Cir. 1970). This letter apparently proceeded from the failure of this juror to comprehend or at least her unwillingness to accept and apply the court's instruction that in this circuit the evidence for the government is not required to exclude every conceivable hypothesis consistent with innocence. Even so, this defendant was the apparent beneficiary of juror Cool's obtusity or obstinancy, as the case may have been, in that after about a day of deliberations the jury decided to acquit Phillips of one of the counts in the indictment thus relieving him of exposure to an additional five-year term of imprisonment and a $15,000 fine, a result which Phillips and his counsel obviously were very happy to receive.

UNPUBLISHED

UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

No. 80-6048

UNITED STATES OF AMERICA, *Appellee,*

v.

CARLOS SARMIENTO; ANGEL LUIS ESTEVEZ; ERNESTO DOMINGUEZ, *Appellants.*

Appeal from the United States District Court for the Eastern District of North Carolina, at Wilmington. F. T. Dupree, Jr., District Judge.

Argued: November 12, 1980 Decided: December 23, 1980

Before BUTZNER, Circuit Judge; FIELD, Senior Circuit Judge; and HALL, Circuit Judge.

Benedict P. Kuehne (Edward R. Shohat, Bierman, Sonnett, Beiley & Shohat, P.A. on brief) for Appellants; Robert T. Davis, Jr., Assistant United States Attorney (James L. Blackburn, United States Attorney on brief) for Appellee.

PER CURIAM:

The appellants were convicted of conspiracy to import marijuana in violation of 21 U.S.C. § 841. Thereafter, the appellants moved for a new trial on the ground that the prosecution failed to disclose favorable evidence as required by *Brady v. Maryland*, 373 U.S. 83 (1963). The district court determined that the information possessed by the government consisted of unconfirmed rumors of mis-

conduct on the part of a material witness, not rising to the dignity of *Brady* material and denied the motion. This appeal followed.

Having reviewed the record and the arguments of counsel, we find that the district court's conclusion is not clearly erroneous. Accordingly, we affirm the denial of a new trial for the reasons set forth in the opinion of the district court. *U.S. v. Sarmiento, et al.*, C/A No. 77-39-CR-7 (E.D. N.C. Jan. 4, 1980).

AFFIRMED.

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 80-6048

UNITED STATES OF AMERICA, *Appellee,*

v.

CARLOS SARMIENTO, et al, *Appellants.*

ORDER

Upon consideration of the appellants' petition for rehearing and suggestion for rehearing en banc, and no judge having requested a poll on the suggestion for rehearing en banc,

It is ADJUDGED and ORDERED that the petition for rehearing is denied.

Entered at the direction of Judge Hall for a panel consisting of Judge Butzner, Judge Field, and Judge Hall.

For the Court,

/s/ WILLIAM K. SLATE, II
Clerk